BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2021-143-E AND 2021-144-E

IN RE:	Application of Duke Energy Progress, LLC for Approval of Smart $aver Solar as Energy Efficiency Program Application of Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program	**SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S REPLY TO RESPONSES TO MOTION FOR SUMMARY JUDGMENT REGARDING THE COMPANIES' PROGRAMS** **AND** **RENEWED REQUEST FOR ORAL ARGUMENT**

On September 27, 2021, the South Carolina Office of Regulatory Staff ("ORS") filed a Motion for Summary Judgment ("Motion"), pursuant to S.C. Code Ann. Regs. 103-829 and South Carolina Rule of Civil Procedure 56, regarding Duke Energy Carolinas, LLC's ("DEC") and Duke Energy Progress, LLC's ("DEP") (collectively referred to herein as the "Companies") respective Applications for Approval of Smart $aver Solar as Energy Efficiency Programs (collectively the "Programs"). In its Motion, ORS sought a ruling as a matter of law that the Companies' proposed Programs violate the plain language of S.C. Code Ann. § 58-40-20(I) and are unlawful, and, therefore, cannot be approved by the Commission. Pursuant to S.C. Code Ann. Regs. 103-829,[1]

[1] The Clean Energy Intervenors filed their response pursuant to S.C. Code Ann. Regs. 103-826, which deals with filing Answers to Petitions, rather than Responses to Motions.

the Companies filed a Response ("Companies' Response")[2] and the South Carolina Coastal Conservation League ("CCL"), Upstate Forever ("UF"), Southern Alliance for Clean Energy ("SACE"), North Carolina Sustainable Energy Association ("NCSEA"), and Vote Solar, joined by the Solar Energy Industries Association (collectively, "Clean Energy Intervenors") filed a Joint Response ("Clean Energy Intervenors' Response") to ORS's Motion. This Reply of ORS addresses both Responses below.

ARGUMENT

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) *citing* Rule 56(c), SCRCP. Although the Companies assert that ORS seeks to have its Motion granted based on a disputed characterization of the record,[3] they are incorrect. While ORS does have serious concerns with the prudency of classifying customer-generators who participate in net energy metering as an Energy Efficiency/Demand Side Management ("EE/DSM") program, which are discussed in the ORS witnesses' pre-filed testimony, the law is agnostic as to whether the Companies classify customer-generators who participate in net energy metering as an EE/DSM program. Where the law is *not* agnostic, however, is the express prohibition on the recovery of lost revenues associated with customer-generators who apply for customer-generator programs on or after June 1, 2021 as contemplated by the Companies' proposed Programs. Accordingly, in taking the Companies' pre-filed testimony to be true, the Commission should grant ORS' Motion.

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[2] Included in the Companies' Response is also a separate Motion to Affirm Legal Standards ("Companies' Motion"). As detailed in a letter filed with the Public Service Commission of South Carolina on October 11, 2021, ORS plans to respond to the Companies' Motion separately and in accordance with S.C. Code Ann. Regs. 103-829.

[3] Companies' Response, p. 18.

1. These Programs Indisputably Fall Within the Solar Choice Metering Program.

In its Motion, ORS asserts that the Programs fall within the Solar Choice Metering ("Solar Choice") Program approved by this Commission pursuant to Commission Order No. 2021-390, which was issued pursuant to S.C. Code Ann. § 58-40-20.[4] In response, the Companies assert that because the Programs were proposed under S.C. Code Ann. § 58-37-20, which is the EE/DSM statute, then the Programs cannot be governed by S.C. Code Ann. § 58-40-20 and the related prohibitions against recovery of lost revenues associated with customer-generators who apply for customer-generator programs on or after June 1, 2021.[5] According to the Companies, the Programs must be viewed by the Commission in light of S.C. Code Ann. § 58-37-20 to the exclusion of S.C. Code Ann. § 58-40-20.[6] In doing so, the Companies urge this Commission to ignore the plain fact that S.C. Code Ann. § 58-40-20 contains express and specific factors created by the General Assembly that the Commission is required to examine for all aspects of net energy metering customer-generators and the Companies seek to improperly limit the statutory lens through which this Commission must view the issues in this proceeding. While ORS does not dispute that the Companies *proposed* that these Programs be implemented pursuant to S.C. Code Ann. § 58-37-20, this does not insulate the Programs from compliance with all other applicable legal requirements, including those set forth in S.C. Code Ann. § 58-40-20.

Based on the Companies' pre-filed testimony, these Programs are intrinsically linked to the Companies' Solar Choice Programs, which were created pursuant to S.C. Code Ann. § 58-40-20. Specifically, in order to participate in the Companies' Programs, customers *must* be a Solar Choice

[4] *See* ORS Motion, p. 3.

[5] *See* Companies' Response, p. 17; S.C. Code Ann. § 58-40-20(I).

[6] *Id.* at pp. 17-18.

customer.[7] Customer-generators also must comply with all installation and interconnection requirements of the Residential Solar Choice Riders, which the Companies represent provides the foundation for net metering.[8] Further, the Companies make clear that these Programs fall within the Solar Choice Program approved by this Commission pursuant to Commission Order No. 2021-390, which was in turn issued pursuant to S.C. Code Ann. § 58-40-20.[9]

The Companies' Response, however, seeks to misdirect the Commission from the issue at hand by inaccurately asserting that ORS believes the Programs to be "indistinguishable" from Solar Choice.[10] It is unclear how the Companies arrived at this conclusion since ORS' Motion simply quotes the Companies' own witnesses who state that the Programs exist only "within the Solar Choice Program."[11] Nonetheless, this red-herring argument essentially comprises a distinction without a difference – it just does not matter whether these Programs are indistinguishable from Solar Choice because the Companies' own pre-filed testimonies have made clear these Programs fall "within the Solar Choice Program," which was approved and only exists pursuant to S.C. Code Ann. § 58-40-20. Accordingly, there is no dispute that these Programs exist within the Solar Choice Program approved pursuant to S.C. Code Ann. § 58-40-20.

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[7] *See* Companies' Tariffs which state, "[t]he Customer must become a new net metering customer on or after January 1, 2022...." Duff Direct Exhibit No. 1 and Duff Direct Exhibit No. 2; Ford Rebuttal Testimony at p. 7, l. 18.

[8] *See* Direct Testimony of Lynda Shafer, p. 4, ll. 21-22, p. 5, ll. 1-3; Application of DEP, p. 1; Application of DEC p. 1.

[9] *See* Direct Testimony of Lynda Shafer, p. 4, ll. 19-21; Duff Exhibit No. 2, p. 3; Docket No. 2021-143-E, Application, p. 3; Docket No. 2021-144-E, Application, p. 3.

[10] *Id.* at p. 19.

[11] *See* ORS Motion, p. 3; *see also* Duff Direct Exhibit No. 1, pp. 3-4 ("DEC proposes to offer an incentive for each new watt of solar PV installed by customers eligible for service under rate Schedule RE within the Solar Choice Program."); Duff Direct Exhibit No. 1, p. 10. Regarding DEC, ("[t]he Customer must comply with all installation and interconnection requirements of the proposed Residential Solar Choice rider."); Duff Exhibit No. 2, p. 3 ("DEP proposes to offer an incentive for each new watt of solar PV installed by residential customers within the Solar Choice Program."). Regarding DEP, Duff Exhibit No. 2, p. 9 ("[t]he Customer must comply with all installation and interconnection requirements of the proposed Residential Solar Choice rider."); Shafer Direct, p. 4, ll. 19-21 ("Eligible customers must become a new Solar Choice Metering customer on or after 20 January 1, 2022, and must comply with all installation and interconnection requirements of the Residential Solar Choice Rider.").

2. Because the Programs are Intrinsically Part of the Solar Choice Program, the Statutory Prohibitions Against the Recovery of Lost Revenues Apply.

The Companies' assertions that principles of statutory interpretation mandate that the provisions of S.C. Code Ann. § 58-40-20(I) were not intended to affect or modify existing cost recovery mechanisms under EE/DSM programs also are unavailing. The lost revenue prohibition in S.C. Code Ann. § 58-40-20(I), which was enacted in 2019 as part of Act 62, was implemented well after the creation of the EE/DSM statutes in 1992 and 1997. In Act 62, the General Assembly took no steps to exempt EE/DSM programs from the lost revenue prohibition. *See Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 145, 750 S.E.2d 65, 72 (2013) ("...the legislature is presumed to be aware of prior legislation and does not perform futile acts."). Thus, the fact that the General Assembly did not create a carve-out from S.C. Code Ann. § 58-37-20 exempting EE/DSM programs from the provisions of S.C. Code Ann. § 58-40-20(I) represents a conscious decision by the Legislature to preclude electric utilities from recovering lost revenues associated with customer-generator programs, even if they are implemented under the guise of an EE/DSM program. *See id.* at 145-46, 72 *quoting State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.") and *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing."). *See also* 82 C.J.S. Statutes § 399 ("In construing a statute to give effect to the intent of the legislature, the court must look to the objectives to be accomplished and the evils or mischief sought to be remedied. ... A statute cannot be interpreted to negate its own stated purpose, but vague notions of a statute's basic purpose are inadequate to overcome words of its text regarding the specific issue under consideration.").

The broader policy implications outlined in Act 62,[12] which ORS supports, also do not justify a departure from the plain meaning of the language in S.C. Code Ann. § 58-40-20(I). Section 16 of Act 62 states:

> Notwithstanding another provision of this act, **or another provision of law,** no costs or expenses incurred nor any payments made by the electrical utility in compliance or in accordance with this act must be included in the electrical utility's rates or otherwise be borne by the general body of South Carolina retail customers of the electrical utility without an affirmative finding supported by the preponderance of evidence of record and conclusion in a written order by the Public Service Commission that such expense, cost, or payment was reasonable and prudent and made in the best interest of the electrical utility's general body of customers.[13] (emphasis added)

Implementation of novel and untested Programs in the name of solar-energy development cannot serve as a basis to justify a departure from the plain language of the law. The Programs, therefore, must be viewed and construed through the complete statutory lens established by the General Assembly and the Companies cannot now retreat from the plain language requirements and limitations established by the General Assembly in S.C. Code Ann.§ 58-40-20.

Reflecting the clear interests they have in this proceeding, the Clean Energy Intervenors further seek to isolate S.C. Code Ann. § 58-40-20(I) from all other sections of Title 58, Chapter 40, which are generally applicable to a utility's net energy metering, by stating that subsection (I) "applies only to a specific form of cost recovery authorized under Order No. 2015-194, which is inapplicable to the Companies' Solar as EE program."[14] However, the Commission cannot read a particular clause of a statute in isolation but instead must give effect to the plain language of a statute. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear

[12] *See* S.C. Code Ann. § 58-41-05.

[13] Section 16, Act 62 (emphasis added).

[14] Clean Energy Intervenors' Response, p. 4.

and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), citations omitted. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." *Id.* In S.C. Code Ann. § 58-40-20(I), the General Assembly stated, in no uncertain terms, "[e]lectrical utilities are prohibited from recovering lost revenues associated with customer generators who apply for customer generator programs on or after June 1, 2021." Importantly, this sentence falls directly within the Net Energy Metering chapter of the Code and not within the Distributed Energy Resources chapter.[15] Accordingly, while there may be a link between this sentence and use of net energy metering as a distributed energy resource, to divorce this sentence from all other net energy metering created pursuant to S.C. Code Title 58, Chapter 40 ignores the plain language of the statute.

Although the plain language is clear, even supposing for argument that any ambiguity exists, the Commission must construe both S.C. Code Ann. § 58-40-20(I) and S.C. Code Ann. § 58-37-20 *in pari materia.*[16] "[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivas v. Rivas,* 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). South Carolina Code Ann. § 58-40-20(I) and S.C. Code Ann. § 58-37-20 both reference the recovery of lost revenues by an electrical utility. Accordingly, these two related statutes must be read in harmony and the harmonious result dictates that an EE/DSM program that exists by virtue of S.C. Code Ann. § 58-40-20 cannot be an alternate method by which the Companies recover lost revenues.

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[15] *See* distinction between S.C. Code 58 Chapters 39 (Distributed Energy Resource Program) and 40 (Net Energy Metering).

[16] *See* Companies' Response, p. 15, Clean Energy Advocates' Response, p. 10.

3. ORS's Motion Would Not Render All EE/DSM Programs Unlawful.

The Companies' Response inaccurately asserts that ORS, through its Motion, seeks to change the current application of the law[17] by mandating that *any* programs utilized in conjunction with Solar Choice be subject to the prohibition of recovery of lost revenue found in S.C. Code Ann. § 58-40-20(I). Likewise, the Clean Energy Intervenors assert that ORS's Motion would render all EE/DSM programs for which customer-generators are eligible suddenly unlawful.[18]

On the contrary, the ORS Motion only seeks to ensure that the Companies comply with the appropriate legal parameters by which they are bound. While the Companies' and Clean Energy Intervenors' Responses espouse the extremist view that "the Companies would be prohibited from recovering lost revenue under all programs in which Solar Choice customers may participate,"[19] that is illogical and untrue. This perspective erroneously conflates the Companies' ability to recover lost revenue from approved EE/DSM programs in which Solar Choice customers participate with the ability of the Companies to recover lost revenue from the proposed Programs that exists pursuant to and are governed in part by S.C. Code Ann. § 58-40-20. Through its Motion, ORS did not indicate, nor did it intend to indicate, that electric utilities may not recover lost revenue associated with *appropriate* EE/DSM programs. Similarly, ORS does not argue that the statute prohibits the Companies from recovering lost revenues associated with every customer-generator that participates in an approved EE/DSM program. Rather, ORS asserts that S.C. Code Ann. § 58-40-20(I) prohibits the Companies from recovering net energy metering lost revenues associated with customer generators under the proposed Programs because they fall squarely

[17] *See* Companies' Response, p. 27.

[18] *See* Clean Energy Intervenors' Response, p. 9.

[19] Companies Response, p. 27.

within the Solar Choice Program approved pursuant to S.C. Code Ann. § 58-40-20 and were merely grafted into the proposed EE/DSM programs.

There can be no dispute that S.C. Code Ann. § 58-40-10 *et seq.* governs net energy metering generally. The applicability of the lost revenue prohibitions in S.C. Code Ann. § 58-40-20(I) extends to lost revenues associated with customer-generators who produce and consume their own generation behind the meter (*i.e.* net energy metering), and participate in a Solar Choice program that exists *only because* of S.C. Code Ann. § 58-40-20, regardless of whether such a program is portrayed as EE/DSM or otherwise. In other words, if a Company customer were a Solar Choice customer-generator pursuant to S.C. Code Ann. § 58-40-20 and also participated in an EE/DSM program that existed outside of the confines of S.C. Code Ann. § 58-40-10 *et seq.*, such as the Commission approved Winter BYOT Program, and that program resulted in lost revenues claimed by the Companies, then those program lost revenues would *not* be associated with a program governed by S.C. Code Ann. § 58-40-10 *et seq.* and would presumably be recoverable.[20]

The Companies and the Clean Energy Intervenors also attempt to bolster their arguments by drawing a meaningless distinction between the "lost revenues" prohibited in S.C. Code Ann. § 58-40-20 and "net lost revenues" they assert are permitted under S.C. Code Ann. § 58-37-20.[21] While the calculation of the Net Energy Metering lost revenues and EE/DSM lost revenues may vary, as discussed above, the Commission is required to look and apply the plain language of the statute.[22] Because the General Assembly did not specifically exempt EE/DSM programs from the

[20] As the Clean Energy Intervenors' Response notes, "[t]he importance of reading a statute in context is apparent from many examples in the South Carolina Code." Clean Energy Intervenors' Response, p. 6. The plain language of a statute is constrained by its context.

[21] To be clear, S.C. Code Ann. § 58-37-20 does not use the term "net lost revenues."

[22] *See supra*, p. 8.

clear prohibitions of S.C. Code Ann. § 58-40-20(I),[23] any difference between "lost revenues" and "net lost revenues" is another distinction without a difference.

The Clean Energy Intervenors' Response also argues that these Programs can be classified as "EE" and discusses cost recovery for EE/DSM programs generally.[24] As discussed previously, ORS's Motion does not dispute whether these Programs can or should be qualified as EE programs, since that analysis has no impact on the ORS Motion, and ORS does not attempt to apply the cost recovery prohibitions, expressly set forth in S.C. Code Ann. § 58-40-20(I), to the Companies' EE/DSM programs generally.[25] Additionally, ORS has no dispute with electric utilities recovering incentives associated with prudent and valid EE/DSM programs and does not assert that Act 62 modified cost recovery of existing EE/DSM programs. As made clear in the Motion and in this Reply, ORS simply asserts that the General Assembly has prohibited the Companies from utilizing these Programs, which fall within the Solar Choice Program, from being a vehicle to recover lost revenues.

In fact, ORS agrees that if the General Assembly intended to prohibit the Companies from recovering net lost revenue under EE programs by operation of S.C. Code Ann. § 58-40-20(I), it would have said so. It did not. Instead, the General Assembly simply stated, "[e]lectrical utilities are prohibited from recovering lost revenues associated with customer-generators who apply for customer-generator programs on or after June 1, 2021."[26] Accordingly, despite all of their

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[23] *See supra*, p. 3.

[24] *See* Clean Energy Intervenors' Response, p. 7.

[25] *See supra*, p. 2 ("While ORS does have serious concerns with the prudency of utilizing Net Energy Metering as an EE/DSM program, which are discussed in the ORS witnesses' pre-filed testimony, it believes the law is agnostic as to whether Net Energy Metering is put in place as an EE/DSM program."). *See also*, p. 4 ("ORS does not believe a legal brief to be the appropriate forum to discuss the merits of the Programs.").

[26] S.C. Code Ann. § 58-40-20(I).

obfuscations, the Companies, and parties that support additional incentives for the adoption of solar as EE, cannot ignore the plain language enacted by the General Assembly.

4. By Failing to Respond to the Timing Issue, the Companies Have Acknowledged They May Not Recover Lost Revenues Arising From These Programs.

In the Motion, ORS asserted it was entitled to Summary Judgment on two grounds: 1) the Programs fall within the Solar Choice Program and therefore the Companies are prohibited from recovering lost revenues pursuant to the express provisions in S.C. Code Ann. § 58-40-20(I), *and* 2) the Companies may not recover lost revenues pursuant to these Programs because "all customers who apply for the Rider will necessarily apply to become net metering customers after June 1, 2021."[27] The Companies' Response fails to address the important timing issue. Accordingly, ORS asserts that the Companies have effectively acknowledged that they may not recover lost revenues under these Programs when the participant applies to be a customer generator on or after June 1, 2021. Because these Programs cannot be approved until after June 1, 2021, it is impossible for the Companies to have Program participants who were approved prior to June 1, 2021. Accordingly, the Companies continue to be barred from recovery of lost revenues based upon the timing factor outlined in S.C. Code Ann. § 58-40-20.

5. The Irrelevancy of Whether the Programs Achieve Applicable EE/DSM Standards and Additional Issues of Material Fact.

The Companies' Response also spends considerable ink discussing whether these Programs achieve applicable EE/DSM standards.[28] This section appears not to be in response to any portion of the Motion, but rather an irrelevant colloquy regarding the Programs' merits. ORS

[27] ORS Motion, p. 4.

[28] *See* Companies' Response, pp. 21-23. It is notable that the Companies fail to cite to the ORS Motion once in this section.

does not believe this legal filing is the appropriate forum to address the factual merits of the Programs. For that reason, ORS only responds that, to the extent the Companies intend this section to highlight a dispute as to the facts, this is another red-herring argument.[29] While there may be a dispute as to the appropriate cost tests to use, or whether it is prudent to classify Solar PV as an EE/DSM program, the Companies admit those disputed facts are separate from, and do not impact, the legal analysis that warrants the granting of Summary Judgment.[30] ORS remains entitled to the Summary Judgment even *if* the Programs achieve applicable EE/DSM standards. In fact, ORS' Motion made clear that ORS did not claim a legal prohibition exists to these Programs moving forward as EE/DSM programs, but *only as to the Program's recovery of lost revenues.*[31] Should the Commission deny the ORS Motion, it is through the appropriate forum— testimony— that ORS reserves its right to respond to the merits of these Programs.

The Companies' Response also highlights other issues of material facts on the supposed basis that these disputes serve to nullify the legal analysis applicable to the award of Summary Judgment.[32] Notably, this portion of the Companies' Response again fails to cite to the ORS Motion one single time, for the likely reason that the facts in dispute have no bearing on whether the Company is legally entitled to recover lost revenues associated with these Programs, which it is not.

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[29] The Companies' Response again mischaracterizes ORS's Motion by asserting that ORS somehow asserted that no factual disagreement existed in the entire record. *See* Companies' Response, p. 23.

[30] The Companies' Response states, "[t]he sufficiency of the Program under accepted EE/DSM standards in South Carolina remains a fundamental disagreement among the parties—which is separate from the dispute as to whether the Program falls within Solar Choice."

[31] *See* ORS Motion, p. 5.

[32] *See* Companies' Response, pp. 23-25.

6. ORS Does Not Seek Further Inquiry to Clarify the Application of the Law.

The Companies further assert that ORS's Motion should be denied because further inquiry into the facts is needed to determine the applicability of the law.[33] However, the Companies' Response twists applicable case law to suggest that the Commission should deny ORS' Motion because "the Commission would clearly benefit by further inquiry into the application of those laws." While the Companies take this opportunity to inappropriately argue the merits of the case once again,[34] the Companies also argue that these proposed Programs are governed by S.C. Code Ann. § 58-37-20, and therefore, exempt from all other statutory requirements.[35] As detailed above, there is no statutory exemption included in S.C. Code Ann. § 58-40-20(I) and the Companies cannot lawfully whittle away their statutory obligations as expressly set forth therein.[36] Accordingly, the law is clear and these Programs as proposed by the Companies cannot be lawfully approved.

As a result, ORS asserts that no clarification of the application of S.C. Code Ann. § 58-40-20 is warranted or necessary. However, to the extent the Commission seeks an opportunity to discuss the application of S.C. Code Ann. § 58-40-20, ORS renews its request for oral argument. Moreover, should the Commission require time to consider the applicability of S.C. Code Ann. § 58-40-20, ORS would respectfully request the procedural dates in this proceeding be held in

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[33] *See* Companies' Response, p. 25. As detailed above, no further inquiry of facts is necessary because it is clear that the Companies cannot run from the governance of S.C. Code Ann. § 58-40-20, which prohibits the Companies' recovery of any lost revenues associates with the proposed Programs.

[34] *See* Companies' Response, p. 26.

[35] *See* Companies' Response, p. 26.

[36] The Companies' Response admits that the Companies may not recover lost revenues resulting from new Solar Choice customers. Companies' Response, p. 14, "Act 62 makes clear that, while the Companies are allowed to recover lost revenue under the Existing NEM Programs, they may not account for and recover similar lost revenues resulting from new Solar Choice customers."

abeyance in the interest of quasi-judicial and administrative economy given these issues are central to the Commission's consideration of approval of the Programs.

7. Summary Judgment Does Not Violate The Companies' Due Process Rights.

According to the Companies' Response, granting ORS's Motion would effectively change established law.[37] As detailed above, ORS does not seek to change established law, but rather seeks the appropriate and consistent application of the plain language of S.C. Code Ann. § 58-40-20 to the Solar Choice programs advanced by the Companies in this proceeding. For that reason, there is no Due Process violation in the Commission granting the ORS Motion.

CONCLUSION

While there remain certain factual disputes, those disputes are not germane to whether granting Summary Judgment is appropriate. As acknowledged by the Companies, those issues are separate. Accordingly, ORS asserts that they can and should be dealt with separately. It is clear that the Companies are seeking recovery of lost revenue through these Programs, that these Programs fall within the Solar Choice Program, which was approved pursuant to S.C. Code Ann. § 58-40-20, and that S.C. Code Ann. § 58-40-20(I) expressly prohibits the Companies from recovering lost revenues associated with these Programs. Moreover, by failing to respond to the timing issue, the Companies have now acknowledged to the Commission that they may not seek recovery of lost revenues under these Programs when the participant applies to be a customer generator on or after June 1, 2021. As a result, for the aforementioned reasons, ORS respectfully renews its request for oral argument, requests that the procedural dates in this proceeding be held in abeyance if required, and requests that its Motion for Summary Judgment be granted.

[37] *See* Companies' Response, p. 28.

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